PATRICK KHOO GHEE WONG

v.

LIM MEI-TZE & OTHER CASES

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL SUITS NO: S-22-105-2009, S-22-1171-2008
& S-24-2404-2008]
14 JUNE 2013

TRUSTS: *Creation of trusts - Allegation that land transferred to defendant as trustee - Intention to create trust - Whether purchase of property in joint names constitutes ownership - Whether defendant acquired half ownership or was a mere trustee - Contribution towards purchase of property - Whether presumption of advancement applied - Whether presumption of resulting trust arose*

TRUSTS: *Trust - Resulting trust - Whether intention to create trust established - Purchase of car during relationship - Whether on trust or absolute gift*

CONTRACT: *Breach - Marriage - Breach of promise to marry - Intention to marry - Whether existed - Whether there was evidence of marriage proposal - Whether time spent together as a whole constituted intention to marry*

The plaintiff and the defendant were in a relationship but the relationship turned sour and they separated. The suits filed by the parties respectively were consolidated and heard together. Suit 1 was filed by the defendant claiming that she was the half owner of a piece of property ('the subject property') and sought for an order for sale pursuant to O. 31 r. 1 of the Rules of the High Court 1980 ('RHC'). The defendant relied on *Cooke v. Head* and also on the case of *Moate v. Moate* to support her contention that as the parties were previously in a relationship, the presumption should be one of advancement rather than resulting trust. However, the plaintiff argued that there was an understanding and/or agreement that the defendant was the half owner in name and that the defendant would hold the subject property on trust for the plaintiff. Suit 2 was filed by the plaintiff for a declaration that the defendant held the half share of the subject property on trust and an order for the defendant to execute documents to transfer her half share to the plaintiff. In the same suit, the

A defendant counterclaimed for breach of promise to marry. The plaintiff also filed Suit 3 in which he claimed that he had purchased a Mercedes Benz ('the car') for the defendant which he paid for and intended the defendant to use the said car but hold the same as trustee and thereby sought for a declaration to
B effect the same. The defendant contended that she contributed RM275,000 towards the purchase of the car and in the alternative, she claimed that the car was an absolute gift by the plaintiff to her. The defendant also counterclaimed that in the event the court found the car was an absolute gift or that the
C defendant held it as a trustee, she was entitled to the refund of the said RM275,000.

Held (dismissing defendant's claim in Suit 1; allowing plaintiff's claim and dismissing defendant's counterclaim in
D **Suit 2; dismissing plaintiff's claim and defendant's counterclaim in Suit 3; no order as to costs):**

(1) The subject property was not intended as a gift to the defendant, rather the plaintiff intended that it was held by the defendant on trust for him. Although the subject property was
E in the joint names of the plaintiff and the defendant, the loan from the bank for the payment of the balance purchase price of the subject property was applied by the plaintiff. The plaintiff also paid RM338,100 being the 10% for the purchase
F price and all other costs. Therefore, even if the court was to adopt the argument of presumption of resulting trust as per *Cooke v. Head*, the case favoured the plaintiff. As the defendant had contributed nothing to the subject property, she was entitled to nothing. Accordingly, the defendant's application for an order for sale pursuant to O. 31 r. 1 of the
G RHC was dismissed. (paras 30 & 41)

(2) The case of *Moate v. Moate* was distinguished as there was a clear intention to marry and payments were made by the husband for the property during the marriage. In the present
H case, there could not be a presumption of advancement by way of a gift in contemplation of a marriage because the relationship between the plaintiff and the defendant fell apart not long after the purchase of the subject property. (paras 43 & 44)

I

(3) As for the purchase of the car, the defendant had issued two cheques to the plaintiff for the sums of RM180,000 (which was obtained from the sale of the defendant's old car) and the

sum of RM275,000 (which was obtained from an earlier car bought by the plaintiff and the defendant which was stolen and the insurance paid out of the sum). On a balance of probabilities, the car was intended as a gift to the defendant and she was not the trustee in respect of the same for the plaintiff. (para 25)

(4) The defendant had failed to adduce sufficient evidence of a breach of promise to marry. The fact that they had stayed together as a whole did not point to the fact that the plaintiff had the intention to marry the defendant. There was no evidence of any marriage proposal. Therefore, the defendant's counterclaim for damages for breach of promise to marry was dismissed. (para 24)

Case(s) referred to:
Cooke v. Head [1972] 2 All ER 38 ***(refd)***
Heng Gek Kiau v. Goh Koon Suan [2007] 6 CLJ 626 CA ***(refd)***
Moate v. Moate [1948] 2 All ER 486 ***(dist)***
Ng See Liang v. Ng Say Hoon [2009] 1 LNS 369 CA ***(refd)***
Shephard & Another v. Cartwright & Others [1955] AC 431 ***(refd)***
Wan Naimah v. Wan Mohamad Nawawai [1972] 1 LNS 164 FC ***(refd)***

Legislation referred to:
Federal Constitution, art. 13
Rules of the High Court 1980, O. 31 r. 1

For the plaintiff - In person
For the defendant - Colin Andrew Pereira; M/s Goh Wong Pereira

Reported by Sandra Gabriel

JUDGMENT

Lau Bee Lan J:

Background

[1] At the outset I wish to state there are three suits which by consent of the parties were consolidated and heard together. In S-24(22)-2404-2008, Miss Lim Mei Tze is the plaintiff whilst Mr Patrick Khoo Ghee Wong is the defendant whilst in S-22-1171-2008 and S-22-105-2009, Mr Patrick Khoo Ghee Wong is the plaintiff whilst Miss Lim Mei Tze is the defendant. For convenience, I shall refer to Mr Patrick Khoo Ghee Wong as the plaintiff and Miss Lim Mei Tze as the defendant.

[2] S-24(22)-2404-2008 was first filed by the defendant (19 April 2012) whereby she contends she is the half owner of the subject property, Plot/Lot No. 2 held under Grant 9337 (Lot 45191) and Grant 50059 (Lot 55482) Mukim Kuala Lumpur, Daerah Kuala Lumpur, having a postal address at 2A, Jalan Rosa Idamansara, Off Changkat Semantan, Bukit Damansara, 50490 Kuala Lumpur ("the subject property") and seeking for an order for sale of the subject property under O. 31 r. 1 of the Rules of the High Court 1980 ('the RHC').

[3] The plaintiff contends there was an understanding and/or agreement that the defendant was half owner in name only and that the defendant would hold the subject property on trust for the plaintiff.

[4] S-22-1171-2008 was filed by the plaintiff on 30 December 2008 for a declaration that the defendant holds her half share of the subject property on trust for the plaintiff and consequential orders, including that the defendant do execute documents to transfer her half share of the subject property to him. The defendant counterclaimed for damages for breach of promise to marry.

[5] S-22-105-2009 was filed by the plaintiff on 20 February 2009. The plaintiff contends that he purchased a Mercedes Benz CLK240(A) for the defendant for which he paid for and intended that the defendant would use the said car but hold the same as trustee and/or nominee and thereby seeking a declaration to effect the same. The defendant contends they were intimate since 2005 and she had contributed RM275,000 towards the purchase of the car and further or alternatively the said car was an absolute gift by the plaintiff. The defendant also counterclaimed that in the event the court finds the said car is an absolute gift from the plaintiff or that the defendant holds it on trust for the plaintiff, she is entitled to the refund of RM275,000.

[6] After a trial of the three suits, the court made the following order:

1. The Plaintiff's claim and the Defendant's counterclaim in Civil Suit No. S4-22-105-2009 are dismissed;

2. The Plaintiff's claim in Civil Suit No. S4-22-1171-2008 is allowed as follows:

(a) a declaration that the Defendant holds half (1/2) of the property known as Plot/Lot No. 2 situated at Geran 9337 (Lot 45191) and Geran 50059 (Lot 55482) Mukim Kuala Lumpur, and has the postal address at No. 2A, Jalan Rosa Idamansara Off Changkat Semantan, Bukit Damansara, 50490 Kuala Lumpur (hereinafter referred to as "the Property") as a trustee for the interest and benefit of the Plaintiff;

(b) the Defendant be restrained whether by himself and/or servants and/or agents from selling, transferring, renting, mortgaging, charging and/or carrying on any dealing in any manner whatsoever on the half (1/2) share of the Property;

(c) the Defendant is ordered to execute all documents and instruments for the purpose of transferring half (1/2) of the Property to the Plaintiff (including but not limited to the Memorandum of Transfer - Form 1A) within 7 days period from the date of order made here;

(d) the Defendant is ordered to produce and execute all documents relevant and necessary for the purpose of redeeming from the charge holder which is HSBC Bank Malaysia Berhad and for the purpose of transferring half (1/2) of the Property to the Plaintiff (including but not limited to the PDS-15 form) within 7 days period from the date of order made here;

(e) if the Defendant fails, refuses or neglects to execute any documents necessary for the purpose of transfer or redemption in (b) and (c) above, the Senior Assistant Registrar of the High Court of Kuala Lumpur is entitled to sign any document necessary on behalf of the Defendant for the purposes of transfer and redemption of the Property to the name of the Plaintiff and any document executed as such will be accepted by the relevant Land Officer/Registrar of Land Title as a valid document as if executed by the Defendant himself/herself;

(f) the Land Officer/Registrar of Land Title is ordered and authorized to take all necessary action including correction of the Plaintiff's name as the sole owner in all documents including the registered ownership of the Property to give influence and effect and also to follow all orders made by this Honourable Court in this action;

A

3. The Defendant's counterclaim in Civil Suit No. S4-22-1171-2008 is dismissed.

4. The Defendant's claim in Originating Summons No. S7-24-2404-2008 is dismissed.

B

5. No order as to costs.

[7] The plaintiff has appealed against a part of the decision stated in para. 6 above namely:

C

(a) Suit 22-1171-2008 – the court's order referred to in para. 2(a), (b), (c), (d), (e) and (f) (however the defendant did not appeal on the defendant's counterclaim on the breach of promise to marry);

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(b) Suit 24(22)-2404-2008 – the court's order dismissing the defendant's claim (which is the flip side of the plaintiff's claim in Suit 22-1171-2008); and

(c) Order of there be no order as to costs.

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[8] The undisputed facts of the case are these. On 11 July 2007, the plaintiff and defendant entered into a sale and purchase agreement to purchase the subject property for the sum of RM3,381,000 (bundle B pp. 17-42).

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[9] The plaintiff entered into a supplemental agreement with the developer dated 11 July 2007 too (bundle B pp. 43-49) for the purchase of all the furniture and fittings stipulated in the said agreement for the sum of RM360,000.

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[10] Both the plaintiff and defendant are the purchasers stated in the sale and purchase agreement and the supplemental agreement for the subject property and the furniture and fittings respectively.

[11] *Vide* a deed of assignment dated 2 August 2007 (bundle B pp. 53-77), the plaintiff and defendant have assigned all their rights to the subject property to HSBC Bank Malaysia Bhd.

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[12] The court will refer to the facts in more detail in so far as it may be necessary in the discussion of the issues below which have been appealed against.

I

Issues

[13] The primary issues in this instant case are:

(a) whether the defendant holds the half share in the subject property as a trustee for the benefit and interest of the plaintiff; and

(b) whether the defendant holds the said car as a trustee for the benefit and interest of the plaintiff or whether it is intended as an absolute gift to the defendant and whether it is the plaintiff's intention, expressly or impliedly to relinquish his interest in the said car to the defendant; and

(c) whether there is a breach of promise to marry on the part of the plaintiff.

Findings

[14] The defendant has filed her claim pursuant to O. 31 r. 1 of the RHC which reads:

> 1. Where in any cause or matter relating to any immovable property *it appears necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold,* the Court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct. (emphasis added)

[15] It is not disputed the plaintiff is now married to Danielle Graham (DW2) and the plaintiff and his family are now residing at the subject property. In the event the court finds the defendant is not holding half of the subject property in trust for the plaintiff but rather he had gifted the half share of the subject property to her, the court has the power to order the sale of the subject property under O. 31 r. 1 of the RHC if the court finds it necessary or expedient to do so in the circumstances of the case. The court will revert to this subject matter at a later stage if the court finds in favour of the defendant.

[16] For the purposes of the appeal lodged by the defendant, it is pertinent to focus on the issue of whether the defendant holds the half share in the subject property as a trustee for the benefit and interest of the plaintiff or whether the plaintiff has gifted it to the defendant.

[17] To deal with this issue, I shall refer to the case of *Ng See Liang v. Ng Say Hoon* [2009] 1 LNS 369; [2009] MLJU 337 (CA) (cited by the defendant) which concerns a dispute of four lots of land which the plaintiff, a brother of the defendant, says belong to him because it was held in trust for him by the deceased defendant who claims that he is the absolute owner of the subject land. It is not disputed their father purchased the subject land when the defendant was ten years old and registered it in the defendant's name. After their father died, the defendant decided to develop the subject land by entering into an arrangement with a licensed housing developer to subdivide the subject land and to construct houses on it. Some of the subdivided lots were later transferred by the defendant to his other siblings but the plaintiff got nothing.

[18] The issue as before the trial judge was whether the disputed land originally purchased by the father in the defendant's name was meant as a gift to him or was intended by him to be held in trust by the defendant for his siblings. Before the trial judge the defendant relied heavily on the presumption of advancement and at the appeal before the Court of Appeal he maintained his stand citing a *dictum* of Viscount Simonds in the case of *Shephard & Another v. Cartwright & Others* [1955] AC 431:

> I think that the law is clear that on the one hand where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favor of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood *in loco parentis*, there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord Eldon said, give way to slight circumstances: *Finch v. Finch* [1808] 15 Ves 43.

[19] Regarding this argument, His Lordship Gopal Sri Ram JCA stated whilst the Court of Appeal agreed with the view expressed above, there are two qualifications:

> First, it is now clear that the presumption of advancement "is a relatively weak presumption which can be rebutted on comparatively slight evidence", to borrow the words of Neuberger LJ in *Laskar v. Laskar* [2008] EWCA Civ 347, citing Lord Upjohn's speech in *Pettit v. Pettit* [1970] 1 AC 777, at 814. Second, the approach to the ascertainment of a donative intention

must be in accordance with the facts and circumstances of each case. In our judgment the primary function of the Court in a dispute of this sort (whether the property was held in trust or otherwise) is to determine whether the initial donor intended to make a gift of the property be it movable or immovable, or whether he intended it to be held by the donee in trust for some other person or persons.

[20] In *Ng See Liang (supra)* His Lordship Gopal Sri Ram JCA referred to a previous judgment of the Court of Appeal in *Heng Gek Kiau v. Goh Koon Suan* [2007] 6 CLJ 626 and stated they would adopt the same approach. In this case the plaintiff (man) commenced an action against the defendant (the plaintiff's mistress) to recover a house he had purchased in her name. Through the relationship the couple had a child. The trial judge found in favour of the plaintiff and hence the appeal by the defendant which was allowed.

[21] His Lordship Gopal Sri Ram delivering judgment on behalf of the Court of Appeal expressed its disagreement with the approach of the trial judge who proceeded at once to the presumption of a resulting trust in that since the defendant was not a member of the class in whose favour a court of equity rebuttably presumes an advancement by donor, the defendant held the house on a resulting trust for the plaintiff. His Lordship stated:

In our judgment the correct approach in cases such as the present is for a court first to determine the true intention of the purchaser. The question whether the purchaser in a particular case had a donative intention is to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. If after such an examination the court concludes that there was a donative intention on the part of the purchaser that is the end of the matter and there is no room for the operation of the presumption of resulting trust or advancement as the case may be. It is only where there are no or insufficient facts or evidence from which a fair inference of intention may be drawn that a court should turn to presumptions as a last resort to resolve the dispute.
(p. 632 F-H (paragraph 7);

That the presumption of resulting trust operates only where there is absent evidence as to the true intention of the parties is borne out by what Lord Upjohn said in *Pettitt v. Pettitt* [1970] AC 777, 814:

> ... **in the absence of evidence to the contrary** if the property be conveyed into the name of a stranger he will hold it as trustee for the person putting up the purchase money (emphasis added)
> (p. 633 B (paragraph 8)

[9] The position is no different in our jurisdiction as demonstrated by the following passage by SK Das' work "*The Torrens System in Malaya*" where the learned author says this (at p. 192):

> A resulting trust arises when a person purchases property in the name of another **not intended as a gift**. (emphasis added)

[10] We therefore approve of the following statement of the law by Gabriel Moss QC (sitting as a Deputy High Court judge) in *Kyriakides v. Pippas* [2004] EWHC 646 (Ch):

> Where there is no declaration, the court puts itself in the position of a jury and considers all the circumstances of the case, so as to arrive at the purchaser's real intention: *Snell* para 9-15. It is only where there is no evidence to contradict the presumption that it will prevail: *Ibid*. The case-law has developed in such a way that even 'comparatively slight evidence' will rebut the presumption and a:
>
> > less rigid approach should also be adopted to the admissibility of evidence to rebut the presumption of advancement' *Lavelle v. Lavelle* [2004] EWCA Civ 223 (CA) per Lord Phillips MR at para 17.
>
> I suspect the position we have now reached is that *the courts will always strive to work out the real intention of the purchaser and will only give effect to the presumptions of resulting trust and advancement where the intention cannot be fathomed* and a 'long-stop' or 'default' solution is needed. (emphasis added)

[22] The main issue in the present case is in some respects similar to the cases of *Ng See Liang (supra)* and *Heng Gek Kiau (supra)* in that the issue is whether the property in dispute is intended as a gift or is held on a resulting trust. Mindful of the approach to be adopted and the principles to be applied in a case of such nature, I shall now turn to the evidence from which the real intention of the parties may be deduced.

[23] The plaintiff met the defendant sometime in July 2005 when they were introduced through each other by a mutual friend. Thereafter they became a couple and decided to live together in a condominium at 934, Desa Damansara, Jalan Setia Kasih, Bukit Damansara which the plaintiff stayed prior to moving to the subject property and to which the defendant moved in (No. 934) from her apartment at Sri Penaga Bangsar which she rented out.

[24] As the relationship progressed, the plaintiff and defendant went away on holidays and the plaintiff bought her flowers and presents. However on a balance of probabilities I find the defendant has failed to adduce sufficient evidence of a breach of promise to marry by the plaintiff. The holidays to Bali and Koh Sam Mui, Thailand, supplementary credit card for the defendant, the RM14,000 diamond ring, the time sharing apartment and the fact that they stayed together as a whole do not point to the fact he had intention to marry her. There was no evidence of any marriage proposal.

[25] According to the plaintiff he noticed that the defendant was after his assets and money and was becoming more demanding. He referred to the purchase of the Mercedes CLK240(A) as the first proof. The defendant issued two cheques to the plaintiff for the sums of RM180,000 and RM275,000. The first sum of RM180,000 was obtained from the sale of the defendant's old car. The sum of RM275,000 was obtained from an earlier car bought by the plaintiff and defendant which was stolen and the insurance paid out the sum. The price of the said car was RM320,000. On a balance of probabilities I held the Mercedes CLK240(A) was intended as a gift to the defendant and she was not a trustee in respect of the same for the plaintiff.

[26] The plaintiff stated the other demand from the defendant was to buy a house. Prior to the purchase of the subject property, the plaintiff purchased a property, No. 35, Jalan Setiakasih 7, Bukit Damansara, 50490 Kuala Lumpur for the purchase price of RM2,650,000 as is evident from the letter of offer and acceptance (sale) dated 14 April 2007 from Eastern Century Realtors (bundle B p. 4). The deal fell through and the real estate agent returned to the plaintiff the full refund of RM53,000, being the 2% earnest deposit of the purchase price (bundle B p. 5). Whilst the plaintiff agreed that it is written in the letter of offer and acceptance (sale) that he and the defendant were joint purchasers, he disagreed that they were joint owners.

[27] According to the plaintiff he moved to the subject property in December 2007 but between October and November 2007, he was there at the subject property mostly on weekends and weekdays to check on the contractor. The defendant said that she and the plaintiff moved into the subject property sometime in October 2007. I am more inclined to believe the plaintiff as the subject property was purchased in July 2007 and it is not disputed there were renovations ongoing.

[28] The plaintiff said the relationship between him and the defendant turned sour in December 2007 and they separated. The defendant testified of a party held at the subject property on 21 December 2007 and her discovery of the plaintiff being together with Danielle Graham and another friend in the bathroom consuming drugs and thereafter of the plaintiff being in the bathroom with Danielle Graham and upon being confronted, he left the subject property and was staying with her in a room in Dorsett Regency Hotel or Ritz Carlton from 20-30 December 2007. From the evidence of Danielle Graham (DW2), defendant's own witness, the evidence revealed that the plaintiff was introduced to Danielle Graham through their good friends, Patricia Lim and Steen Saw at KL Hilton in 2005, and they first started dating in March 2008; engaged in October 2008 and were married in 2009 and have two children out of the marriage. In cross-examination, Danielle Graham described that she and the plaintiff are happily married for three years and that the plaintiff is a wonderful father and a good provider for the family and totally denied about the bathroom incident with the plaintiff consuming drugs and checking into a hotel with him. Weighing the probabilities of the evidence I find there is no truth in what the defendant alleged against the plaintiff and I accepted the plaintiff's evidence the relationship between him and defendant fell through about December 2007.

[29] The defendant contended that the defendant cannot be a trustee for the plaintiff in respect of the subject property and the plaintiff's contention is a mere afterthought:

(i) as the subject property is in the joint names of the plaintiff and defendant;

(ii) the plaintiff failed to dispute the defendant's claim when through her solicitors' letter dated 17 October 2008 (bundle B pp. 124-125), she asserted her claim on her half share of the subject property; and

(iii) the plaintiff's answer in cross-examination that he informed the defendant that she was holding the subject property on trust when they separated.

[30] Weighing the evidence in this case and on a balance of probabilities, I find on the evidence adduced, on the part of the purchaser (plaintiff-donor) that the subject property is not intended as a gift to the defendant (donee); rather he intended it to be held by the defendant in trust for him. My reasons are these. First, notwithstanding that the subject property is in the joint names of the plaintiff and defendant as evident from the sale and purchase agreement, the supplemental sale and purchase agreement, the deed of assignment (bundle B pp. 53-73) and the power of attorney dated 2 August 2007 (bundle B pp. 74-77), however (i) the loan from HSBC for payment of the balance purchase of the subject property was applied by the plaintiff as is evident from the facility agreement dated 2 August 2007 between the plaintiff (borrower) and the bank (bundle B pp. 78-107); (ii) plaintiff paid to the developer RM338,100, being 10% of the purchase price (RM3,381,000) comprising RM67,620 (prior to execution) and RM270,480 (upon execution of the sale and purchase agreement) *vide* two UOB Cheques No. 080121 and 080122 respectively from his UOB Bank Current Account No. 248-4836004248 bundle B p. 52) as is evident from the two receipts issued by the developer (bundle B pp. 51 and 50).

[31] Second, the purchase price of all the furniture and fittings amounting to RM360,000 was paid by the plaintiff to the developer on 20 November 2007 *vide* MBB Cheque No. 015787 and a receipt was issued to him (bundle B p. 111).

[32] Third, plaintiff paid the sum of RM6,378.14 to the developer *vide* MBB Cheque No. 015792 for payment of the electricity deposit and stamping, assessment (12 October 2007-31 December 2007) and maintenance fees (November 2007-April 2008) (bundle B p. 110). Plaintiff continued to make payments for the assessments of the subject property in 2008 as is evident from the statement of account for the period 1 May 2008 till 31 December 2008.

[33] Fourth, the plaintiff paid the monthly instalment of RM16,423 to HSBC Bank till to date as payment towards the loan sum of RM3,042,000 being 90% of the loan facility which loan sum is payable for a period of 30 years.

[34] The plaintiff's *modus* of paying for the intended property to be purchased is consistent with his conduct when he paid the earnest deposit for the purchase of No. 35, Jalan Setiakasih 7, Bukit Damansara. The fact that the plaintiff and the defendant were stated as joint purchasers as admitted by him in the letter of offer and acceptance (sale) did not detract from the fact that they were not joint owners as the sale was aborted.

[35] The fact that plaintiff failed to dispute the defendant's claim averred through her solicitors' letter dated 17 October 2008 bears little weight as the plaintiff explained he had not seen it otherwise he would have responded.

[36] The defendant's argument that she has a constitutional right to compensation under art. 13 of the Federal Constitution bears no merit as the very premise upon which she staked her claim is a live issue to be determined by the court.

[37] There is no requirement that a trust must be in writing as contended by the defendant (*Wan Naimah v. Wan Mohamad Nawawai* [1972] 1 LNS 164; [1974] 1 MLJ 41 H-I right).

[38] The defendant relied on a passage from the case of *Cooke v. Head* [1972] 2 All ER 38 at p. 42 as follows:

> In the light of recent developments, I do not think it is right to approach this case by looking at the money contributions of each and dividing up the beneficial interest according to those contributions. The matter should be looked at more broadly, just as we do in husband and wife cases. We look to see what the equity is worth at the time when the parties separate. We assess the shares as at that time. If the property has been sold, we look at the amount which it has realised, and say how it is to be divided between them.

[39] In *Cooke v. Head (supra)*, C was H's mistress. They bought a bungalow and renovated it. The court accepted the evidence that C put in efforts into the renovations and she helped with the mortgage instalments. They separated when the bungalow was near completion. The Court of Appeal took into account C's contributions and held she was entitled to 1/3 of the sale of the bungalow.

[40] It is clear that the case of *Cooke v. Head (supra)* concerns the presumption of a resulting trust and the matters to be taken into account in assessing the parties' share of the property and the correct apportionment in dividing the beneficial interest in the property between the parties. The Court of Appeal at p. 39 held:

> (i) The constructive or resulting trust imposed by the courts on the legal owner in the case of a husband and wife who by their joint efforts acquired property to be used for their joint benefit, applied to a man and his mistress who acquired property by their joint efforts with the intention of setting up home together; accordingly, in the present case H held the property on trust for himself and C beneficially.

[41] Hence for argument case even if this court is to approach the case from the angle of presumption of a resulting trust, I find the case *Cooke v. Head (supra)* favours the plaintiff in that as the defendant contributed nothing to the subject property, she is entitled to nothing.

[42] The defendant relied on the case of *Moate v. Moate* [1948] 2 All ER 486 and submitted the present case is not a case of transfer of property from one stranger to another; instead the property was vested in both the plaintiff and defendant at the onset. Both parties were in a relationship and the presumption should be one of advancement than one of resulting trust. I am of the view that the plaintiff's contention is flawed and cannot be sustained for the following reasons.

[43] *Moate*'s case *(supra)* can be distinguished. In this case, there is a clear intention to marry and the property was purchased in their joint names prior to marriage. The parties were married and lived together for 13 years. Payments were made by the husband for the property during the marriage. It was urged upon the court by counsel for the husband to hold that a transfer of property by an intended husband to an intended wife is for this purpose no more than a transfer from one stranger to another. The court found the view to be contrary to common sense and held there can be no practical distinction for this purpose between a transfer by an intending husband to an intending wife and a transfer as between a husband and wife. The court' reasoning at p. 487 H is:

> The reason for presuming advancement is stronger where the gift is made in contemplation of the marriage before it is actually solemnised than it is where the transaction is post-nuptial. It

A seems to me the presumption would be, in the former case, that the intending husband is making a gift to the lady in consideration of the marriage, a gift by way of wedding present which he intends to take effect in her favour beneficially provided the marriage is duly solemnised. I, therefore, hold that the presumption in this case is that the husband intended this to be a provision by way of gift to his wife provided the marriage was duly solemnised. (emphasis added)

[44] However in the present case there cannot be a presumption of advancement by way of a gift in contemplation of a marriage because the relationship between the plaintiff and defendant fell apart not long after the purchase of the subject property and in any event it is the court's finding there is no breach of promise to marry which finding was not appealed against by the defendant.

Conclusion

[45] For the foregoing reasons, on a balance of probabilities the court made the order stated in para. 6 above.

[46] The reason why I ordered there be no order as to costs is this. Suit 22-105-2009 which is in respect of the plaintiff's claim to the Mercedes Benz CLK240(A) was decided in favour of the defendant. S-24(22)-2404-2008 which is the defendant's claim in relation to the subject property is the flip side of the plaintiff's claim in S-22-1171-2008; I had dismissed the defendant's claim in S-24(22)-2404-2008 and allowed the plaintiff's claim in S-22-1171-2008 and also dismissed the defendant's counterclaim for damages for breach of promise to marry.